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**House Committee on the Judiciary**

**Subcommittee on the Constitution**

**Testimony of Michael K. Lewis, Arbitrator, *Pigford v. Veneman***

**September 28, 2004**

I have had various roles in the progress of the *Pigford v. Veneman* case from its inception to its current implementation stage and would like to describe briefly those roles to you. I have served as the parties' mediator, the Consent Decree Arbitrator, both for the Track B arbitration process and for the ¶ 5(g) late claim process, and as a court-appointed referee for fee disputes.

- A) Mediator: My first contact with the parties in the *Pigford* case came in late December 1997 when the parties contacted me regarding my willingness to serve as a mediator in an effort to help them resolve the lawsuit. Beginning in January 1998 through the entry of the Consent Decree in April 1999, I served as the parties' mediator. After the entry of the Decree, especially before the appointment of the Monitor, on a few occasions I attempted to help the parties resolve issues arising in the implementation of the decree.
- B) Arbitrator: The parties chose me as the arbitrator identified in the consent decree to resolve all claims in which farmers chose Track B – the process that provides for an 8 hour in-person hearing to resolve their claims. Statistics for that process are provided in Randi Roth's Chart 1. There is one additional piece of information I wanted to alert you to in the Track B process, that is that the total number of Track B claims filed totals 237, rather than the 174 identified in Chart 1. The difference

between the 174 number mentioned in Chart 1 and the 237 I have just mentioned is that because, even though the consent decree's language in Paragraph 5(d) states that a choice of tracks is irrevocable, USDA generally has been willing to permit farmers to switch from Track B to Track A. Sixty farmers have chosen to switch tracks. In such instances, the Facilitator sends to that farmer a claim form for use in the Track A process, and that claim is processed under the decree's terms for Track A claims. The remainder of the difference is attributable to farmers who withdrew their claims.

C) Paragraph 5(g), Late Claim Petitions: Paragraph 5(g) of the consent decree provides that:

A claimant who satisfies the definition of the class in ¶ 2(a), above, but who fails to submit a completed claim package within 180 days of entry of this Consent Decree may petition the Court to permit him to nonetheless participate in the claims resolution procedures provided in ¶¶ 9 & 10, below. The Court shall grant such a petition only where the claimant demonstrates that his failure to submit a timely claim was due to extraordinary circumstances beyond his control.

On December 20, 1999, Judge Friedman delegated to me the responsibility for reviewing petitions filed pursuant to ¶ 5(g), that is, those who sought to file a claim after the October 12, 1999 deadline. On July 14, 2000, the Court issued an order providing, among other things, that no late claim petition would be accepted for consideration if filed after September 15, 2000. As the Monitor's Chart 2 illustrates, 65,950 late claim petitions were filed by the September 15, 2000 deadline. An additional, 7,742 were filed after the September 15, 2000 deadline. Each of the petitioners in the latter category was sent a letter by me informing them that he or she had missed the court imposed deadline; those who subsequently showed that there was a misreading of the postmark became part of the 65,950 petitions considered.

I have completed my initial review of all 65,950 petitions. Of the 65,950, I have found 2,268 petitions to have met the “extraordinary circumstances beyond his control” standard contained in ¶ 5(g). All of those whose petitions were approved showed that it was more likely than not that extraordinary circumstances beyond the petitioner’s control caused the petitioner to miss the October 12, 1999 deadline. Hurricane Floyd, which resulted, among other things, in 60 counties in North Carolina being declared disaster areas by FEMA after it struck in mid-September 1999, and medical conditions that rendered an individual or his/her caretaker unable to attend to daily matters, provided the predominant reasons upon which petitions were approved. Any petitioner approved was sent a Claim Form, with a sixty-day filing window.

The overwhelming reason provided by those whose petitions were denied was some form of lack of knowledge: unawareness of the existence of the settlement, disbelief in the settlement’s legitimacy, unawareness of deadlines and filing procedures, or disbelief in the petitioner’s eligibility under the settlement. This, despite the notice provided under the settlement, approved by the Court as “sufficient under Rule 23.”

The ¶ 5(g) process requires that a farmer provide a written statement, signed under the penalty of perjury, indicating why the farmer missed the original filing deadline of October 12, 1999 and the “extraordinary circumstances” leading to the missed deadline. Because the population of people for whom the late claim process applied might be disadvantaged by a reliance solely on writings, I employed a cadre of law students and recently-minted lawyers (totaling 38 at the high point) as researchers to contact petitioners to question them about their petitions, and to obtain additional information and documentation. Approximately 75% of the petitions could be decided on the basis of the petitions themselves. There was ambiguity in the other approximately 25% of the petitions filed. Those petitions were referred to one of the researchers for investigation. Each researcher used as a

guide a questionnaire based upon the reason provided in each individual petition. Researchers were instructed, however, to deviate from the questionnaire if new information came to light during the interview so that I would have the fullest understanding about why the farmer had missed the October 1999 filing deadline. If the petitioner could not be reached by telephone, a written questionnaire was mailed to him or her.

Although not provided for in the consent decree, I created a process permitting late claim petitioners to request reconsideration of my decision to deny their participation in the *Pigford* settlement. The reconsideration process provided petitioners with a 60 day window in which to request reconsideration of the initial decision to deny their late claim petitions. I specifically encouraged petitioners to provide additional information and documentation, if available. Approximately 21,011 farmers, constituting approximately 33% of the total number of denied petitions, have timely requested that I reconsider my initial denial of their late claim petition. If upon reconsideration, it became clear that my initial decision was incorrect, or that relevant information was not considered, those petitions have been approved. Any request that casts doubt on my initial decision has been referred to a researcher for investigation. All petitions denied upon reconsideration are being sent letters describing in detail how a petitioner has failed to demonstrate, despite all efforts, that his or her situation meets the 5(g) standard.

Greater detail on the late claim process can be found in the six reports I have filed with the Court regarding the process since November 2001, copies of which have been provided to the Committee. The reports also are posted on the Monitor's website for review by anyone with internet access. On more than one occasion, late claim petitioners have attempted to address the fact of their denial to the Court. On each such occasion of which I am aware, and most recently on September 13, 2004, the Court has upheld the late claim petition process I have described.

D) Fee Disputes: On December 30, 2002, the Court referred to me fee disputes arising between class counsel and the government. Under the terms of the Court's order, quarterly fee petitions are to be filed by class counsel, the government responds to those petitions in writing, and my task is then to engage the parties in discussions designed to resolve any outstanding issues. If the parties are successful in resolving their dispute, they so indicate to the Court by filing a stipulation. If the parties are unsuccessful in their efforts, I am required to submit findings and recommendations to the Court on the fees in dispute.

I am happy to answer any questions members of the Committee might have.